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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 229

ESTATE OF HOUNSELL; HOUNSELL, ADMINISTRATOR,
Petitioner,

vs.

DEPARTMENT OF TAXATION OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

The petitioner, the Estate of Nellie Hounsell, deceased, E. J. Hounsell, administrator, prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Wisconsin denying a motion for rehearing entered June 9th, 1948, and a judgment of said Court entered February 17th, 1948. The opinion is found in 252 Wis. 138. See appendix.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. par. 344 the Judicial Code of the U. S. Sec. 237 and the Amendments thereof.

The Question Presented

Is sec. 72.01 (6) of the Wisconsin Statutes of 1945 as construed by the Supreme Court of Wisconsin in this case contrary to the 5th and 14th Amendments of the Constitution of the United States? Is this Statute valid as construed by the Wisconsin Court in view of the Estate of Schlesinger, 270 U. S. page 238 reversing the Supreme Court of Wisconsin 184 Wis. page 1 and *Hoeper* v. *Tax Comm. of Wisconsin,* 284 U. S., page 206, reversing the Supreme Court of Wisconsin 202 Wis. 493? Is a Statute valid that imposes an inheritance tax on the husband's property because of the death of his wife when documentary title is in the name of the husband and wife?

How the Question Was Raised

The Supreme Court of Wisconsin had heretofore construed Sec. 72.01 (6) of the Wisconsin Statutes as permitting the consideration of all competent evidence pertaining to the title to properties in joint names. Estate of Mahoney (1939), 233 Wis. 138 on page 144, 288 N. W. 763.

The decision in this case is the first indication that the Supreme Court of Wisconsin would construe this statute so as to preclude consideration of the facts as to title to property and in such a manner as to make the statute contrary to the 14th and 5th Amendments of the Constitution of the United States (R. 65).

The trial court considered all of the evidence in this case following the rule of the *Mahoney* case. The Attorney General by argument and brief urged the Court to consider all of the evidence as did the appellant.

On motion for rehearing the Constitutional question was raised (see appendix). The motion for rehearing was denied without costs (R. 72).

Under such facts this Court may take jurisdiction. *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 675.

The Statute Involved

The Statute involved is "Sec. 72.01 (6) Wisconsin Statutes 1945, Joint interests.

> Whenever any property, real or personal, is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositaries in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer of one half or other proper fraction thereof taxable under the provisions of this chapter in the same manner as though the property to which such transfer relates belonged to the tenants by the entirety, joint tenants or joint depositors as tenants in common, and had been bequeathed or devised to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor, by will."

Decision of the Court

The decision of the Supreme Court of the State of Wisconsin said "The terms of the statute involved here leave no room for questioning from where the interest of each of the parties came. It states the rule as affecting cases of this character, and the only exception which exists in favor of a surviving tenant is where the joint title has come into being under, and is a part of, a transaction clearly indicating a trust relation or the existence of an agency only. Otherwise, all that is needed to set the statute in motion is to have property in the joint names of the parties. When

that is the case and one of the parties dies, the right of the other to the whole 'shall be deemed a transfer of one half . . . thereof.'

"The order including for inheritance tax purposes one-half of the property held in the joint names of E. J. and Nellie Hounsell must therefore be affirmed." (Decision is set forth in full in appendix).

The Importance of the Question

The practice of putting properties in two names and the increasing number of inheritance tax problems arising because of this practice and the validity of the statute makes this issue important to the State of Wisconsin and all States having a similar statute.

The amount involved in this particular case is the sum of $5,374.17.

Wherefore we respectfully urge this Court to issue a Writ of Certiorari to the Supreme Court of the State of Wisconsin.

A. D. SUTHERLAND,
Attorney for Appellant,
Fond du Lac, Wisconsin.

June 28, 1948.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The constitutionality of Wisconsin Statutes, 72.01 (6) was raised on motion for rehearing before the Supreme Court of Wisconsin.

The decision of the Supreme Court of Wisconsin construed this Statute as to preclude the consideration of evidence contrary to its prior interpretation of the same statute in the Estate of Mahoney, 233 Wis. 138 (1939), 288 N. W. 763. "We hold that the Court's finding of such joint ownership is sustained by the evidence. . . . The inheritance tax assessed on the basis of Josephine's one-half interest must be sustained."

The decision in the *Hounsell* case is the first intimation that the Supreme Court would construe this Statute as precluding the consideration of the facts of the case.

The Attorney General and appellant argued to the Supreme Court that evidence be construed. The lower Court considered all the evidence.

> "A Federal question raised for the first time on petition for rehearing in the highest court of the State, is raised in time when it is presented by a construction placed upon a Statute by such Court in the decision at variance with a construction formerly adopted by it."
> *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (74 L. Ed. 1107).

The decision of the Supreme Court was an unexpected and not reasonably anticipated construction of a Wisconsin Statute which gives the Supreme Court of the United States the right of review though the constitutional question is first raised on a motion for rehearing.

Great Northern Ry. Co. v. *Sunburst Oil & Ref. Co.* (1932); 287 U. S. 358; 77 L. Ed. 360;
State of Mo. v. *Gehner,* 281 U. S. 313; 74 L. Ed. 870;
Sanders v. *Shaw,* 244 U. S. 317; 61 L. Ed. 1163.

"The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights of the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278; 57 L. Ed. 510; 33 Sup. Ct. Rep. 312. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

Sec. 72.01 (6) as construed by the Wisconsin Courts leaves no room for the consideration of evidence as to title of properties put in the name of two or more persons. The Statute attempts to create a fact and is contrary to the 5th and 14th Amendments of the Constitution of the United States. It precludes consideration of evidence and is not due process and deprives this appellant of property contrary to the Constitution of the United States.

Schlesinger v. *Wis.*, 270 U. S. 230, reversing 184 Wis. 1;
Hoeper v. *Tax Com.*, 284 U. S. 206, reversing 202 Wis. 493;
Western & Atlant. Ry. v. *Henderson*, 279 U. S. 639;
Manley v. *Ga.*, 279 U. S. 1;
McFarland v. *American Sugar Ref. Co.*, 241 U. S. 79.

When property was placed in the name of two or more persons the Wisconsin Supreme Court considered all of the evidence in determining title in all cases where sec. 72.01 (6) of the Wisconsin Statutes was not involved.

Tweeddale v. *Tweeddale*, 1903, 116 Wis. 517;
Marshall & Illsley Bank v. *Voigt*, 1934, 214 Wis. 27, 252 N. W. 355;
Estate of Staver, 1935, 218 Wis. 114; 260 N. W. 655;
Estate of Krause, 1942, 241 Wis. 41; 4 N. W. 2nd 122.

It is this statute as construed that prevents this appellant from having the fact of ownership determined by evidence.

The Court's construction of this statute requires this appellant to pay an inheritance tax on the property of E. J. Hounsell solely because his wife died. The monies were placed in the name of husband and wife for convenience. As in the *Voigt* case, *supra*, they were always E. J. Hounsell's money. This Court now says that this statute makes one half of these properties pass to E. J. Hounsell because his wife died although they always were the properties of E. J. Hounsell and E. J. Hounsell must pay an inheritance tax on his own properties.

In the *Hoeper* case (284 U. S. 206), this court said an income tax statute that made the husband pay a tax on his wife's income and in effect made the wife's income the husbands was contrary to the 14th Amendment.

We respectfully submit that 72.01 (6) is equally void and certiorari be granted that justice be done.

Respectfully submitted,

A. D. Sutherland,
Attorney for the estate of Nellie Hounsell, deceased. E. J. Hounsell, Administrator.

APPENDIX A

Motion for Re-Hearing

Title of Case

Now comes E. J. Hounsell, administrator of the estate of Nellie Hounsell, deceased and moves this Court for a re-hearing of its decision in this case filed February 17th, 1948.

Ground for Motion

Whereas the appellant has heretofore, and within the time provided by law and the rules of the above entitled court, served and filed his motion for re-hearing of his appeal in the above entitled case;

Therefore, now comes the appellant above named and states and asserts the following as some of the grounds in support of his motion for rehearing and for rehearing of his appeal in said entitled case;

That the decision of this court affirming the order of the court below deprives appellant as administrator of said estate of its property without due process of law, and denies him and said estate the equal protection of the laws, all contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States, in the following particulars, among others:

1. Section 72.01 (6) of Wisconsin Statutes, 1946, is so construed as to prevent the consideration of the evidence introduced by the appellant explaining the title to the property in question; and as to prevent this appellant from "questioning from where the interest of each of the parties came;" and to prevent consideration of the admissible evidence that the ownership of property is in fact different than the indicated documentary title.

2. By its decision, which is so arbitrary as to be unconstitutional and contrary to such amendments, the Supreme Court deprives this appellant of the right to introduce evidence by stating that "E. J. Hounsell is in effect seeking to reform title," when the fact is that E. J. Hounsell is not a party to this litigation; and E. J. Hounsell as administra-

tor, offered evidence to oppose the imposition of an unjust tax upon this estate. Under previous decisions of this court in construing Section 325.16, Wis. Stats. 1945, the law was established that, while ordinarily if the cause of action arises out of a transaction with the deceased person, the survivor may not testify, that rule does not apply where the claimed cause of action is said to arise from statutes, which, in this case, are the inheritance tax statutes passed by the Legislature of the State of Wisconsin.

Dated: March 10, 1948.

ESTATE OF NELLIE HOUNSELL, DECEASED,
E. J. HOUNSELL, as Administrator.
By A. D. SUTHERLAND,
Its and His Attorney.

APPENDIX B

Decision of the Court

FAIRCHILD, *J.*:

The title to the real and personal property involved in this appeal was so fixed as to make E. J. Hounsell and his wife joint tenants and to bring the property, for inheritance-tax purposes, under the terms of sec. 72.01 (6), Stats. 1945. The language of that statute is clear. It provides that whenever property is held in the joint names of two persons, upon the death of one, the right of the survivor to the immediate ownership of the property shall be deemed a transfer of one half of the property, taxable in the same manner as though the property belonged to the parties as tenants in common and had been bequeathed or devised to the surviving party by the deceased.

The appellant contends that there was no taxable interest to pass on Nellie Hounsell's death because she had no actual interest in the property. She had not bought an interest in it, and no gift had been made to her of a one-half interest. To show that no valid gift had been made to her, appellant cites a number of cases which are to be distinguished from the one at bar. In Marshall & Illsley Bank *v.* Voigt (1934), 214 Wis. 27, 252 N. W. 355 and Estate of Krause (1942),

241 Wis. 41, 4 N. W. (2d) 122, bank deposits in joint accounts were involved. In each case there was a claim by the estate of the deceased that the deposit belonged to the estate rather than to the joint holder of title to the account, and in each case this court held that there had been no valid gift of the account by the deceased to the other party whose name appeared on the account. In the Marshall & Illsley Bank case it was found that the accounts were carried in the joint names solely for the convenience of the deceased in handling the fund, and in the Krause case the purpose of carrying the joint bank account was to secure additional deposit protection. In estate of Staver (1935), 218 Wis. 114, 260 N. W. 655, this Court held that a joint payee of a certificate of deposit took title by survivorship in the absence of clear and satisfactory evidence that would warrant affecting the legal title with a trust. In none of these cases concerning the question of joint ownership was there an inheritance tax problem involved. None of these cases arose under section 72.01 (6). Like those cases, the one at bar does involve joint bank accounts. Here, however, those joint bank accounts are part of an evident pattern or policy of joint ownership by the husband and wife of their property. Unlike those cases, this one involves real estate, real-estate mortgages, and a note, in addition to the bank deposits. No special reason for keeping the bank accounts in the joint names appears to justify treating them differently from the other property jointly owned. There is not evidence to justify holding that Nellie Hounsell held her half interest in trust for her husband. As the trial judge said in his decision,

"The title to all of this property is in their joint names of record, and E. J. Hounsell takes title thereto as the surviving joint tenant. The only way he could avoid taking title in this way would be by some proceeding in court against the estate of his deceased wife to have the deeds, assignments, mortgages reformed to conform to what he claims is the true intent of the parties, or to declare that Nellie Hounsell held an undivided one half of the property during her lifetime in trust for said E. J. Hounsell."

A discussion of additional cases cited by the appellant, dealing with the law of gifts, is unnecessary since none of

them involves joint tenancy. Will of Mangan (1925), 185 Wis. 328, 200 N. W. 386; Estate of Ogden (1932), 209 Wis. 162, 244 N. W. 571; Madison Trust Co. *v.* Skogstrom (1936), 222 Wis. 585, 269 N. W. 249; Tucker *v.* Simrow (1946), 248 Wis. 143, 21 N. W. (2d) 252.

The terms of the statute involved here leave no room for questioning from where the interest of each of the parties came. It states the rule as affecting cases of this character, and the only exception which exists in favor of a surviving tenant is where the joint title has come into being under, and is a part of, a transaction clearly indicating a trust relation or the existence of an agency only. Otherwise, all that is needed to set the statute in motion is to have property in the joint names of the parties. When that is the case and one of the parties dies, the right of the other to the whole "shall be deemed a transfer of one half . . . thereof." The order including for inheritance-tax purposes one half of the property held in the joint names of E. J. Hounsell and Nellie Hounsell must therefore be affirmed.

Objection was raised at the hearing to testimony of E. J. Hounsell on the ground that it constituted evidence of transactions with the deceased. The trial court heard the testimony subject to the objection. In its decision the court held that E. J. Hounsell was incompetent to testify as to any transactions with the deceased and the evidence involving the same was thereby rejected. A brief of amicus curiae presented on this appeal makes the persuasive argument that sec. 325.16, Stats. 1945, ought not render an heir, legatee, devisee, or donee incompetent to testify in an inheritance tax hearing. That statute provides:

"No party or person in his own behalf or interest, and no person from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased or insane person, or in any action or proceeding in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first, in his own behalf, introduce testimony of himself or

some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates. . . ." It is suggested that the cause of action in cases like this is based upon the claim of the state to recover inheritance-taxes and that that cause of action arises from the state's power to tax and not from the deceased.

We recognize that this rule of evidence, set forth in sec. 325.16, Stats. — may exclude evidence that might promote rather than impede justice. Nevertheless, in applying that statute to the facts of this case, we conclude that the trial court made the proper ruling. By claiming that no interest passed on Nellie Hounsell's death, E. J. Hounsell is in effect seeking to reform the evidences of title. Were he to attempt that in any other type of proceeding, he would clearly be incompetent to testify as to any transactions with his deceased wife. Inasmuch as the same result is sought in this proceeding, it is considered that the same rule of evidence should apply.

Because all material facts are before the court without consideration of the inventory we find no reason to hold, as appellant suggests, that the inventory was not properly before this court on appeal.

By order of the Court.—Order affirmed.